88- 1764

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

MONTE LEE POST, Petitioner,

v.

LUIS GARCIA,

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT,

and the

ATTORNEY GENERAL OF THE STATE OF
CALIFORNIA, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

==========

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(PETITIONER IN PRO SE)

QUESTIONS PRESENTED

1. Should a federal appellate court hear the merits of federal constitutional claims when such court has knowledge that the appellant has been released from state custody while awaiting the appeal, thereby leaving the appellant with no further plain, speedy, or adequate remedy at law to exhaust his federal constitutional claims in the state courts?

2. Does the state exhaustion requirement of Section 2254 cases preclude a state prisoner from using alternative means of exhausting federal constitutional claims, when the state provides such alternative means, other than by filing repetitive petitions for writ of habeas corpus; and the federal appellate court has itself recognized such alternative means as meeting the exhaustion requirement of state remedies?

3. Whether this Court should decide the merits of an applicant's federal constitutional claims, or alternatively order such claims heard in the federal district court, when said claims have been summarily dismissed in all previous state and federal court applications; and the applicant has been released from state custody while awaiting the appeal, thereby leaving the applicant with no further plain, speedy, or adequate remedy at law to exhaust his federal constitutional claims in the state or federal courts?

Petitioner's claims are as follows:

(1) Whether it is a denial of due process for a criminal trial judge to deny a requested defense instruction, when such denial relieves the prosecution of its burden of proof by precluding a jury from deciding the facts pertaining to said defense instruction and thereby

precluding the defendant from raising a reasonable doubt of his guilt; and which denial further in effect, directs the jury to find the defendant guilty on that count?

(2) Whether it is a denial of due process for a state appointed appellate counsel to refuse to present any federal constitutional claims for his client on direct appeal?

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fn 1 All parties to the proceeding are as listed in the caption.

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MONTE LEE POST, Petitioner,

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LUIS GARCIA,

UNITED STATES COURT OF APPEALS
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CALIFORNIA, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

==========

Petitioner, Monte Lee Post, hereby petitions this Court for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Ninth Circuit.

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OPINIONS BELOW

1. There was no published opinion by the United States Court of Appeals, for the Ninth Circuit, on the merits of the federal constitutional claims presented on Petitioner's APPEAL, just the court's MEMORANDUM. [Post v. Garcia, et al. 9th Cir. No. 87-5879]; (App. A, pp. 39-49, infra).

2. There was no opinion by the United States District Court, just the court's ORDER ADOPTING REPORTS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE. [Post v. Garcia, et al., CV86-7547-RMT(RWR)]; (App. C, pp. 63-64, infra).

3. There was no published opinion on Petitioner's applications to the state courts, just those courts' one page denials. [People v Post, Cal.App. No. 2D CRIM. 43254]; (App. C, p. 52); [People v. Post, Cal.Supreme Ct. No. S-000869]; (App. C, p. 53).

JURISDICTION

1. On November 19, 1986, Petitioner filed a PETITION FOR WRIT OF HABEAS CORPUS in the United States District Court. [Post v. Garcia, et al., D.C. No. CV-86-7547-RMT].

2. On March 6, 1987, the district court filed its JUDGMENT dismissing Petitioner's PETITION FOR WRIT OF HABEAS CORPUS without prejudice, which was entered on March 12, 1987. [Post v. Garcia, et al., D.C. No. CV-86-7547-RMT].

3. On March 23, 1987, Petitioner filed his NOTICE OF APPEAL to appeal the district court's judgment. [Post v. Garcia, et al., D.C. No. CV-86-7547-RMT].

4. On April 9, 1987, the district court filed its ORDER DENYING CERTIFICATE OF PROBABLE CAUSE, which was entered on April 22, 1987. [Post v. Garcia, et al., D.C. No. CV-86-7547-RMT].

5. On May 11, 1987, Petitioner

filed his REQUEST FOR CERTIFICATE OF PROBABLE CAUSE in the United States Court of Appeals for the Ninth Circuit. [Post v. Garcia, et al., 9th Cir. No. 87-5879].

6. On July 7, 1987, the Ninth Circuit Court of Appeal issued its ORDER granting Petitioner a certificate of probable cause on Petitioner's appeal. [Post v. Garcia, et al., 9th Cir. No. 87-5879].

7. On April 30, 1988, Petitioner was released from the custody of the California Department of Corrections.

8. On Oct. 4, 1988, the JUDGMENT of the U.S. Court of Appeals for the Ninth Circuit was filed and entered. [Post v. Garcia, et al., 9th Cir. No. 87-5879]; (App. B, p. 50, infra).

9. On Oct. 17, 1988, Petitioner filed a PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC. [Post v. Garcia, et al., 9th Cir. No. 87-5879].

10. On Dec. 30, 1988, the U.S. Court of Appeals for the Ninth Circuit denied the petition for rehearing. [Post v. Garcia, et al., 9th Cir. No. 87-5879]; (App. B, p. 51, infra).

11. Jurisdiction of this Court is invoked under Title 28 U.S.C., section 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

1. The Sixth Amendment to the United States Constitution provides that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have the compulsory process of obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

2. Section 1, of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. Title 28 U.S.C., section 2254 (a) - (d). (App. C, pp. 63-65, infra).

STATEMENT OF THE CASE

1. **Proceedings in the state superior court:**

During Petitioner's criminal trial there was evidence introduced on Petitioner's behalf that Petitioner was "....unconscious of a reasoning process of the brain." [Los Angeles County Superior Court No. A-148388; R.T. pp. 903-904]; (App. C, p. 54, infra).

Petitioner's trial counsel requested the CALJIC instruction on unconsciousness, CALJIC 4.30, which was denied by the trial court. [Los Angeles County Superior Court No. A-148388; R.T. p. 972]; (App. C, p. 55-58, infra).

The trial court determined the facts of Petitioner's case [Los Angeles County Superior Court No. A-148388; R.T., p. 976]; (App. C, p. 58, infra), before it was submitted to the jury. [Los Angeles County Superior Court No. A-148388; R.T.,

p. 1112]; (App. C, p. 59, infra).

The trial court had also espoused its disbelief in Petitioner's testimony. [Los Angeles County Superior Court No. A-148388; R.T. p. 1144-1145]; (App. C, p. 59, infra).

On October 10, 1986, Petitioner filed a Petition for Writ of Habeas Corpus in the superior court. Post v. Garcia, et al. CV-86-7547-RMT (District Court [D.C.], Docket Entry 10, Exhibit "A", pp. 5-33).

On February 13, 1987, the petition for writ of habeas corpus was summarily denied by the superior court. Post v. Garcia, et al. No. 87-5879 (Petition for Rehearing, Exhibit "X"); Post v. Garcia, et al. CV-86-7547-RMT (D.C., Docket Entry 10, Exhibit "D", p. 37).

2. Proceedings on state direct appeal:

During Petitioner's direct appeal,

Petitioner's appointed appellate counsel refused to present Petitioner's federal constitutional issues to the state appellate court. Post v. Garcia, et al. No. 87-5879 (Excerpts of the clerk's record); Post v. Garcia, et al. CV-86-7547-RMT (D.C., Docket Entry 9, pp. 17-27).

3. Additional proceedings in the state appellate court:

On April 6, 1987, Petitioner applied to the California Court of Appeal, Second Appellate District for a Motion to Recall the Remittitur; Memorandum of Points and Authorities. [Post v. Garcia, et al. 9th Cir. No. 87-5879, (Request for Certificate of Probable Cause, Exhibit "X")]. The federal questions presented to the California Court of Appeal are as set forth therein.

On April 29, 1987, the California Court of Appeal, summarily denied the

motion to recall the remittitur. [Post v. Garcia, et al.9th Cir. No. 87-5879, (Petition for Rehearing, Exhibit "Y")]; (App. C, p. 52, infra).

4. Additional proceedings in the state supreme court:

On May 11, 1987, Petitioner applied to the California Supreme Court for a Petition for Review; Memorandum of Points and Authorities, to review the California Court of Appeals summary denial of Petitioner's motion to recall remittitur. [Post v. Garcia, et al. 9th Cir. No. 87-5879 (Request for Certificate of Probable Cause, Exhibit, and again lodged with the court at oral argument)]. The federal questions presented to the California Supreme Court are as set forth therein.

On July 22, 1987, the California Supreme Court summarily denied the petition for review. [Post v. Garcia, et al. 9th Cir. No. 87-5879 (Petition for

Rehearing, Exhibit "Z")]; (App. C, p. 53, infra).

5. Proceedings in the federal district court:

On November 19, 1986, Petitioner filed a petition for writ of habeas corpus along with a memorandum of points and authorities in support thereof in the district court. [Post v. Garcia, et al. 9th Cir. No. 87-5879 (Excerpts of the Clerk's Record on Appeal; D.C. Docket Entry 1)]. The district court dismissed the petition for Petitioner's failure to exhaust state remedies. [Post v. Garcia, et al. 9th Cir. No. 87-5879 (Excerpts of the Clerk's Record on Appeal; D.C. Docket Entry 13)].

During the proceedings in district court, Petitioner objected to the Report and Recommendations of United States Magistrate because of the refusal to recommend a hearing into the "cause" and

"prejudice" issue of Petitioner's appointed appellate counsel's **refusal** to present Petitioner's federal issues on direct appeal. [Post v. Garcia, et al. 9th Cir. No. 87-5879 (Excerpts of the Clerk's Record on Appeal; D.C. Docket Entry 9 & 10)].

On March 6, 1987, the district court filed its JUDGMENT dismissing Petitioner's PETITION FOR WRIT OF HABEAS CORPUS without prejudice, which was entered on March 12, 1987. [Post v. Garcia, et al. 9th Cir. No. 87-5879 (Excerpts of the Clerk's Record on Appeal; D.C. Docket Entry 13)]. (App. C, p. 62, infra).

On March 23, 1987, after the district court refused to hear the "cause" and "prejudice" issue of Petitioner's appointed counsel's **refusal** to present Petitioner's federal constitutional issues on direct appeal, Petitioner filed his NOTICE OF APPEAL to appeal the

district court's judgment. [Post v. Garcia, et al. 9th Cir. No. 87-5879 (Excerpts of the Clerk's Record on Appeal; D.C. Docket Entry 14)].

On April 9, 1987, the district court filed its ORDER DENYING CERTIFICATE OF PROBABLE CAUSE, which was entered on April 22, 1987. [Post v. Garcia, et al. 9th Cir. No. 87-5879 (Excerpts of the Clerk's Record on Appeal; D.C. Docket Entry 15)].

6. Proceedings on appeal in the federal appellate court:

On May 11, 1987, Petitioner filed his REQUEST FOR CERTIFICATE OF PROBABLE CAUSE in the United States Court of Appeals for the Ninth Circuit. [Post v. Garcia, et al. 9th Cir. No. 87-5879].

On July 7, 1987, the Ninth Circuit Court of Appeal issued its ORDER granting Petitioner a certificate of probable cause on Petitioner's appeal. [Post v.

Garcia, et al. 9th Cir. No. 87-5879].

On September 3, 1987, Petitioner filed his APPELLANT'S BRIEF. [Post v. Garcia, et al. 9th Cir. No. 87-5879].

On or about October 15, 1987, the Respondent filed the APPELLEES' BRIEF. [Post v. Garcia, et al. 9th Cir. No. 87-5879].

On October 26, 1987, Petitioner filed his APPELLANT'S REPLY BRIEF. [Post v. Garcia, et al. 9th Cir. No. 87-5879].

On April 30, 1988, Petitioner was released from the custody of the California Department of Corrections.

On September 14, 1988, the court of appeal heard oral argument, at which time Petitioner informed the appellate court of Petitioner's release from custody. [Post v. Garcia, et al. 9th Cir. No. 87-5879 (Taped Record of Oral Argument)].

On October 4, 1988, the court of

appeals filed its MEMORANDUM, [Post v. Garcia, et al. 9th Cir. No. 87-5879]; (App. A, pp. 39-49, infra), and entered its JUDGMENT. [Post v. Garcia, et al. 9th Cir. No. 87-5879]; (App. B, p. 50, infra).

On Oct. 17, 1988, Petitioner filed a PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC. [Post v. Garcia, et al. 9th Cir. No. 87-5879].

On Dec. 30, 1988, the court of appeals filed an ORDER denying the petition for rehearing. [Post v. Garcia, et al. 9th Cir. No. 87-5879]; (App. B, p. 51, infra).

The court of appeals did not order a hearing into the "cause and prejudice" issues. [Post v. Garcia, et al. 9th Cir. No. 87-5879]; (App. A, pp. 39-49; B, pp. 50-51, infra).

REASONS FOR GRANTING THE PETITION

[Rule 17.1(a) and (c)]

This case presents important federal questions of habeas corpus issues, which the lower federal courts have so far departed from the accepted and usual course of judicial proceedings and has further sanctioned such departure by the state courts; and has further decided Petitioner's case in a way that is in direct conflict with applicable decisions of this Court and the Ninth Circuits' own decisions; and as such, the lower courts judicial proceedings have sanctioned the denial of Petitioner's federal constitutional rights by a state trial court.

As a result, Petitioner has no other plain, speedy, or adequate remedy at law by which to challenge those federal constitutional claims, other than by this petition to this Court.

ARGUMENT

The Ninth Circuit Court of Appeals and the California Supreme Court have effectively held that Petitioner should not be given any opportunity to have his federal constitutional claims fully and fairly litigated in either the state or federal courts; and that the state trial court's denial of Petitioner's Sixth and Fourteenth Amendment rights will be sanctioned by both state and federal courts, by denying Petitioner the opportunity to be heard on the merits of such claims. (App. A, pp. 39-49; B, pp. 50-51; C, pp. 52-53, infra).

These unprecedented rulings seriously misconstrues and ignores this Court's decisions in, Henry v. Mississippi, 379 U.S. 443 [13 L.Ed.2d 408, 85 S.Ct. 564] (1965), reh.den. 380 U.S. 926; Humphrey v. Cady, 405 U.S. 504 [31 L.Ed.2d 394, 92 S.Ct. 1048] (1972); Sanders v. United

States, 373 U.S. 1 [10 L.Ed.2d 148, 83 S.Ct. 1068] (1963); Smith v. Digmon, 434 U.S. 332 [54 L.Ed.2d 582, 98 S.Ct. 597] (1978); Townsend v. Sain, 372 U.S. 293 [9 L.Ed.2d 770, 83 S.Ct. 745] (1963); Young v. Ragen, 337 U.S. 235 [93 L.Ed. 1333] (1949); and those inalienable rights imbedded in the United States Constitution. Sixth & Fourteenth Amendments to the United States Constitution.

Furthermore, the Ninth Circuit's decision on Petitioner's appeal has contradicted that court's own decisions.

The Ninth Circuit had previously decided, that in California a motion to recall remittitur, and petition for review, were alternative means of exhausting state court remedies for habeas corpus purposes, where reinstatement of the appeal was appropriate. Hayward v. Stone, 496 F.2d 844, 846 (9th Cir. 1974); Turner v. Compoy, 827 F.2d 526, 529-530

(9th Cir. 1987).

The Ninth Circuit's Hayward decision pointed out the California Supreme Court holding, that the remedy of recall of the remittitur was an adjunct to the writ of habeas corpus, even though a writ of habeas corpus would be available to perform the same function; and that such remedy could be treated as a petition for writ of habeas corpus, by the state courts. Hayward v. Stone, supra at 496 F.2d 845-846, citing People v. Mutch, 4 Cal.3d 389 [93 Cal.Rptr. 721, 482 P.2d 633] (1971).

In the Mutch case, the California Supreme Court stated:

> "An exception is made, however, when the error is of such dimensions as to entitle the defendant to a writ of habeas corpus. The recall of the remittitur may then be deemed an adjunct to the writ, and will be granted when appropriate to implement the defendant's right to habeas corpus."

People v. Mutch, supra at 4 Cal.3d

396-397. (citations omitted). There is nothing in the above-stated citation from which the state appellate court could have reasonably interpreted that it could summarily deny a motion to recall the remittitur, without abrogating the defendant's right to habeas corpus, particularly when violations of federal constitutional rights were claimed. [Post v. Garcia, et al., 9th Cir. No. 87-5879 (Request for Certificate of Probable Cause, Exhibits)]; (App. C, p. 52).

However, when Petitioner filed his motion to recall the remittitur and petition for review, in order to exhaust his state court remedies, both the state appellate court and the state supreme court chose to ignore Petitioner's federal constitutional claims therein, by declining to reopen Petitioner's appeal, more particularly when one of Petitioner's federal claims was the ineffective

assistance of counsel on appeal. [Post v. Garcia, et al., 9th Cir. No. 87-5879 (Request for Certificate of Probable Cause, Exhibits)]; (App. C. pp. 52-53, infra). Hayward v. Stone, supra at 496 F.2d 846; Smith v. Digmon, supra at 434 U.S. 333; Turner v. Compoy, supra at 827 F.2d 529-530.

Because the state courts ignored Petitioner's federal claims, there is no record indicating that Petitioner has ever been afforded the opportunity for an evidentiary hearing in the state courts to have Petitioner's federal constitutional claims fully and fairly litigated. (People v. Post, Cal.App. 2D CRIM. No. 43254, Motion to Recall Remittitur; Cal.Supreme Court No. S-000869, Petition for Review). Townsend v. Sain, supra at 372 U.S. 312-314, 316. (App. C, 52-53, infra).

Furthermore, there were no citations

of procedural defects, or insistence on Petitioner's compliance with any procedural rules in the state courts orders. (App. C, pp. 52-53, infra). Smith v. Digmon, supra at 434 U.S. 333; Turner v. Compoy, supra at 827 F.2d 529-530; Hayward v. Stone, supra at 496 F.2d 846.

Then when Petitioner applied to the Ninth Circuit Court of Appeals for a certificate of probable cause, Petitioner submitted the above-stated state court applications, as evidence of Petitioner's diligent efforts to exhaust his state court remedies, and which must have been considered as having fairly put Petitioner's federal constitutional claims before the state courts, otherwise the Ninth Circuit certainly would not have issued a certificate of probable cause. [Post v. Garcia, et al., 9th Cir. No. 87-5879 (Request for Certificate of Probable Cause, Exhibits; and Order)].

After the Ninth Circuit issued the certificate of probable cause, the appeal went forward. The briefs were filed, and oral argument was set for September 14, 1988. [Post v. Garcia, et al., 9th Cir. No. 87-5879].

On April 30, 1988, before oral argument, Petitioner was released from custody.

When Petitioner appeared at oral argument on September 14, 1988, Petitioner informed the Ninth Circuit appellate court panel that Petitioner had been released from state custody. [Post v. Garcia, et al., 9th Cir. No. 87-5879 (Taped Record of Oral Argument)].

Because Petitioner had been released from custody, Petitioner was then without a state court remedy to challenge Petitioner's federal constitutional claims. [Post v. Garcia, et al., 9th Cir. No. 87-5879 (Petition for Rehearing with

Suggestion for Rehearing En Banc; Memorandum of Points and Authorities, p. 8)]. Townsend v. Sain, supra at 372 U.S. 311-314 & 316; Young v. Ragen, supra at 337 U.S. 238-239; 28 U.S.C., section 2254 (b), (c); [28 U.S.C.S., section 2254(b), (c)].

However, when the Ninth Circuit wrote its MEMORANDUM, the Ninth Circuit discounted Petitioner's other federal claims as not having been presented to the state's highest court in Petitioner's motion to recall the remittitur and petition for review, when in fact Petitioner's appeal should have been reopened because one of Petitioner's federal claims was the denial of counsel on appeal. (App. A, p. 48, infra). Hayward v. Stone, supra at 496 F.2d 846.

A close reading of the Hayward case will show also that the Ninth Circuit relied on dicta in order to affirm the

district court's judgment, thereby further precluding Petitioner from any hearing on the merits of Petitioner's federal claims. (App. A, p. 48, infra). Henry v. Mississippi, supra at 379 U.S. 447; Humphrey v. Cady, supra at 405 U.S. 516, fn18, 517; Townsend v. Sain, supra at 372 U.S. 312-314, 316; Young v. Ragen, supra at 337 U.S. 238-239.

By the Ninth Circuit's distorted MEMORANDUM, and denial of a rehearing, when confronted with this Court's case law, the Ninth Circuit has ignored this Court's decisions and sanctioned the state courts' arbitrary and capricious summary denial of Petitioner's federal constitutional claims. (App. B, p. 51, infra). Henry v. Mississippi, supra at 379 U.S. 447; Humphrey v. Cady, supra at 405 U.S. 516, fn18, 517; Townsend v. Sain, supra at 372 U.S. 312-314, 316; Young v. Ragen, supra at 337 U.S. 238-

239.

As this Court has previously pointed out, the exhaustion requirement of 28 U.S.C., section 2254(b), cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in a petitioner's brief in the state courts. Smith v. Digmon, supra at 434 U.S. 333.

It is beyond any reasonable doubt that Petitioner's federal constitutional claims were fairly presented to the state's highest court, along with the substance, necessary facts, issues, or whatever else the state's highest court needed in order to apply controlling legal principles to Petitioner's constitutional claims. [Post v. Garcia, et al., 9th Cir. No. 87-5879 (Request for Certificate of Probable Cause, Exhibits)].

As a result of the state courts'

summary denials, lack of citations to any procedural defects, and their ignoring of Petitioner's federal claims; (App. C, pp. 52-53, infra) and the subsequent refusal by the Ninth Circuit to hear the merits of Petitioner's federal constitutional claims, Petitioner has been made to suffer the denial of the vindication of those claims without any hearing in either the state or federal courts. (App. A, pp. 39-49; B, pp. 50-51; C, pp. 52-52, infra). Henry v. Mississippi, supra at 379 U.S. 447; Humphrey v. Cady, supra at 405 U.S. 516, fn18, 517; Townsend v. Sain, supra at 372 U.S. 312-314, 316; Young v. Ragen, supra at 337 U.S. 238-239; 28 U.S.C., section 2254 (d)(1), (2), & (6); [28 U.S.C.S., section 2254(d)(1), (2), & (6)].

Furthermore, Petitioner has now been held accountable, by the Ninth Circuit, for procedural defaults in the state

courts, without any evidentiary hearing being held in order to determine whether Petitioner deliberately bypassed the orderly procedure of the state courts. Humphrey v. Cady, supra at 405 U.S. 516, fn18, 517.

On at least one previous occasion, this Court has ordered that exhaustion of state remedies can take place after a petition for writ of habeas corpus has been filed in the district court, In re Shuttlesworth, 369 U.S. 35 [7 L.Ed.2d 548, 82 S.Ct. 55] (1962), another issue which was not addressed by the Ninth Circuit. (App. A, pp. 39-49, infra).

This Court has further held that once jurisdiction attaches, by the filing of a petition for writ of habeas corpus in the district court, jurisdiction is not lost by the petitioner's subsequent release from custody. Carafas v. LaVallee, 391 U.S. 234 [20 L.Ed.2d 554,

88 S.Ct. 1556] (1968).

Therefore, the Ninth Circuit should have heard the merits of Petitioner's federal claims, or at least ordered them heard in the district court. [Post v. Garcia, et al., 9th Cir. No. 87-5879 (Petition for Rehearing with Suggestion for Rehearing En Banc; Memorandum of Points and Authorities)]; (App. B, p. 51, infra).

However, now that Petitioner has been released from custody, and there is no state or federal court remedy to resolve Petitioner's federal constitutional claims, that leaves this Court as the only court with jurisdiction remaining to either determine those claims, or to order a hearing thereon by a lower court. Young v. Ragen, supra at 337 U.S. 238-239; Henry v. Mississippi, supra at 379 U.S. 447; 28 U.S.C., section 2254(a), (b), (c), & (d)(1), (2), & (6); [28

U.S.C.S., section 2254 (a), (b), (c), & (d)(1), (2), & (6)].

Petitioner would hope that this Court will not subscribe to the conventional notions of finality of litigation, when the infringement of constitutional rights are alleged (p. 32, infra); and that this Court will apply the rule of stare decisis, uphold its previous decisions, and grant certiorari in this matter. Sanders v. United States, supra at 373 U.S. 8.

FEDERAL CONSTITUTIONAL CLAIMS

Petitioner submits the two following federal claims, which are as follows:

(1) Whether it is a denial of due process for a criminal trial judge to deny a requested defense instruction, when such denial relieved the prosecution of its burden of proof of proving the defendant's guilt beyond a reasonable doubt, by precluding a jury from deciding the facts pertaining to said requested defense instruction; and thereby precluding the defendant from raising a reasonable doubt of his guilt; and which denial further in effect, directs the jury to find the defendant guilty on that count?

When the state's highest court and the federal court of appeals refused to hear the merits of Petitioner's federal claims, those courts seriously misconstrued and ignored the provisions of the

Sixth and Fourteenth amendments of the United States Constitution; and said courts have further ignored this Court's decisions in, Duncan v. Louisiana, 391 U.S. 145 [20 L.Ed.2d 491, 88 S.Ct. 1444] (1968); United Brotherhood v. U.S., 330 U.S. 395 [91 L.Ed. 973, 67 S.Ct. 775] (1947); In re Winship, 397 U.S. 358 [25 L.Ed.2d 368, 90 S.Ct. 1068] (1970); and Rose v. Clark, 478 U.S. 570, [92 L.Ed.2d 460, 106 S.Ct. 3101] (1986), regarding the due process clause requirement that the deprivation of life, liberty, or property by adjudication must be preceded by a trial by jury as the sole trier of fact in all criminal cases.

In Petitioner's criminal trial, the state trial judge refused to give Petitioner's requested defense instruction of unconsciousness, (CALJIC No. 4.30), thereby precluding the jury from deciding the facts of whether Petitioner

was "unconscious of a reasoning process of his brain", nor the evidence relating thereto, and in effect the jury was directed to find Petitioner guilty on an assault charge. [People v. Post, superior court No. A-148388, R.T. 903-904, 972, 974-976]; (App. C, pp. 54-58, infra).

Such denial by the state trial court was a denial of Petitioner's right to a fair and impartial trial by jury, which has been sanctioned by the lower state and federal courts. (App. B, pp. 50-51; C, pp. 52-53, infra). Zemina v. Solem, 438 F.Supp. 455, 469 (D.C. S.D. 1977), aff'd. 573 F.2d 1027 (8th Cir. 1978); United Brotherhood v. U.S., supra at 330 U.S. 408; In re Winship, supra at 397 U.S. 364; Rose v. Clark, supra at 478 U.S. 578; Duncan v. Louisiana, supra at 391 U.S. 149; Sixth & Fourteenth Amendments to the United States Constitution.

(2) Whether it is a denial of due process for a state appointed appellate counsel to refuse to present any federal constitutional claims for his client on direct appeal?

When the state's highest court and the federal court of appeals refused to hear the merits of Petitioner's federal claims, those courts seriously misconstrued and ignored the provisions of the Sixth and Fourteenth amendments of the United States Constitution, and further ignored this Court's decision in, Anders v. California, 386 U.S. 738 [18 L.Ed.2d 493, 87 S.Ct. 1396] (1967) reh.den. 388 U.S. 924, as to Petitioner's right to the adequate assistance of counsel on appeal; and in, Wainright v. Sykes, 433 U.S. 72, 90-91 [53 L.Ed. 2d 594, 97 S.Ct. 2497] (1977), as to the lower federal courts' duty to hear the "cause and prejudice" issues of appointed counsel's refusal to

argue Petitioner's federal constitutional claims on direct appeal, which are complete and separate issues from state exhaustion issues.

When Petitioner asked appointed counsel to protect Petitioner's federal constitutional claims, counsel refused. Post v. Garcia, et al., No. 87-5879 (Excerpts of the clerk's record, D.C. No. CV-86-7547-RMT, Docket Entry 9, pp. 17-25). Anders v. California, supra at 386 U.S. 741.

Such action by appellate counsel was a denial of Petitioner's right to the adequate assistance of counsel on appeal, which, the lower courts have sanctioned. (App. B, pp. 50-51; C, pp. 52-53, infra). Anders v. California, supra at 386 U.S. 741; Sixth & Fourteenth Amendments to the United States Constitution.

CONCLUSION

Because of these unprecedented rulings, and because Petitioner is no longer in custody, thereby precluding any other plain, speedy, or adequate remedy to challenge Petitioner's federal claims in either state or federal courts, the petition for writ of certiorari to review the Ninth Circuits' judgment should be granted, and the state should be ordered to prove beyond a reasonable doubt that the errors Petitioner complains of did not contribute to Petitioner's conviction; and that Petitioner was not denied the effective assistance of counsel on appeal, or the judgment of Petitioner's conviction in the superior court should be reversed and vacated.

Date: April 14, 1989

Respectfully submitted.

Monte Lee Post

Monte Lee Post, Petitioner
(In pro se)

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Not for Publication

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

Monte Lee Post, Petitioner/Appellant, v. LUIS GARCIA, et al., Respondent/Appellee.	No. 87-5879 D.C. No. CV-86-7547-RMT MEMORANDUM*

Appeal from the United States District Court for the Central District of California Robert M. Takasugi, District Judge, Presiding

Argued and Submitted September 14, 1988
Pasadena, California

Before: NORRIS, HALL and KOZINSKI, Circuit Judges.

Monte Lee Post appeals pro se from the dismissal of his petition for a writ of habeas corpus. The district court held that Post had failed to exhaust his state remedies as required by 28 U.S.C. Section 2254(b) & (c) (1982). We affirm.

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* This disposition is not appropriate for publication and may not be cited to

or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

We review the denial of a petition for habeas corpus de novo. Kim v. Villalobos, 799 F.2d 1317, 1319 (9th Cir. 1986). Before a state prisoner can petition for federal habeas corpus relief, he must first exhaust all available state remedies. 28 U.S.C. section 2254(b); Picard v. Connor, 404 U.S. 270, 275 (1971). The petitioner can satisfy the exhaustion requirement by giving the highest state court a "fair opportunity" to consider each of his claims before he presents it to the federal habeas court. Picard, 404 U.S. at 276; Middleton v. Cupp, 768 F.2d 1083, 1086 (9th Cir. 1985), cert. denied, 478 U.S. 1021 (1986). "A claim is fairly presented if the petitioner has described the operative facts and legal theory on which his claim is based." Tamapua v. Shimoda, 796

F.2d 261, 262 (9th Cir. 1986); see also Picard, 404 U.S. at 277-78.

After being convicted in the Los Angeles County Superior Court of assault with a deadly weapon, Post diligently pursued his post-conviction remedies both pro se and with the aid of his court-appointed attorney. On direct appeal, Post claimed that the trial court had committed reversible error in refusing to instruct the jury on unconsciousness as a complete defense. He further alleged that the trial court had abused its discretion in denying probation and had committed errors in sentencing. Appellant's Opening Brief, People v. Post, 2d Crim. No. 43254 (Oct. 7, 1983), 2 Clerk's Record (CR), Post v. Garcia (Traverse), Exhibit 4 at 59, 60-61. After rejecting these contentions, the California Supreme Court denied his petition for a hearing.

Post then petitioned the California Supreme Court for a writ of habeas corpus, again contending that the trial court had committed reversible errors both in instructing the jury and in imposing the sentence. He also presented two new claims: that he had been denied effective assistance of counsel at trial and on appeal, and that the trial was unconstitutional for, among other reasons, "denial of right to have a significant issue determined by the jury." Post cited only California cases and the California constitution as authority for his claims. Petition for Writ of Habeas Corpus in the Supreme Court of California, Post v. Yockey, No. 23046 (Apr. 2, 1983), 2 CR, Post v. Garcia (Traverse), Exhibit 4 at 56-57. The California Supreme Court denied his petition.1/

1/ In a second habeas corpus petition

to the Los Angeles Superior Court, Post made arguments based on federal constitutional grounds. As the Superior Court denied this petition, and it was never presented to the California Supreme Court, it cannot satisfy the exhaustion requirement. Middleton v. Cupp, 768 F.2d at 1086 (petitioner's claim must be presented to the highest court of the state).

After he was released from prison, but while still on parole, Post filed a petition for a writ of habeas corpus in the United States District Court.2/ In this petition, Post argued that "[t]he trial court's refusal to instruct on unconsciousness/involuntary intoxication removed a material issue of fact from the jury's consideration, violating petitioner's right to a jury trial under both the

---

2/ As Post was in custody at the time he filed his habeas corpus petition, his case is not moot even though he was released from parole while this appeal was still pending. Carafas v. LaVallee, 391 U.S. 234 (1968); see also C. Wright, A. Miller & E. Cooper, 17A Federal Practice and Procedure section 4262 at 295 (1988).

California and United States Constitutions." Petition for Writ of Habeas Corpus by a Person in State Custody, Post v. Garcia, No. CV-86-7547-IH(RWR) (Nov. 19, 1986) in 2 CR, Post v. Garcia Objections, Exhibit A at 25. In support of his federal habeas claim, Post argued that the trial court's refusal to give a requested jury instruction relieved the prosecution of its burden of proving every element of the offense beyond a reasonable doubt, thus violating Post's right to due process. Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus, id., Exhibit B at 32; Traverse to Return to Petition for Writ of Habeas Corpus, id. at 13. The district court denied the petition, and Post appealed to this court.

While this appeal was pending, Post submitted an application to the

California Court of Appeal to recall the remittitur. This application is a California post-conviction remedy allowing a petitioner to request the Court of Appeal or the California Supreme Court to reassert its jurisdiction over his case. In his application, Post alleged that he had been denied his federal constitutional rights to a trial by jury, to a fair trail and to effective assistance of counsel at both the trial and appellate level. Motion to Recall Remittitur; Memorandum of Points and Authorities, People v. Post, No. 2d Crim. 43254 (Apr. 6, 1987), 3 CR, Exhibit X. After the Court of Appeal denied this application without an opinion, Post petitioned the California Supreme Court to review the denial. This petition was also denied without an opinion.

Our comparison of Post's state and federal court claims indicates that Post

failed to exhaust his state remedy for the due process claim he now makes in his federal habeas petition. In state court, Post contended that the trial judge violated state law and the state constitution in refusing to give a requested jury instruction. While a habeas petitioner need only present the substance of his claim in state court, Post's claim of a state law violation is not substantially equivalent to his federal habeas claim that the court denied him due process in violation of the fourteenth amendment of the federal constitution. See Anderson v. Harless, 459 U.S. 4 (1982) (habeas petitioner's claim in state court that the trial court's instruction on the element of malice was erroneous is not the substantial equivalent of his claim in federal habeas court that this error violated his right to due process).

Although Post alleged similar facts

in state and federal court, "[i]t is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." Id. at 6 (citations omitted). Rather, the petitioner must give the state the opportunity "to apply controlling legal principles to the facts bearing upon his constitutional claim." Id. By failing to raise his due process contentions in state court, Post denied the California Supreme Court the opportunity to determine whether his federal constitutional rights were violated. We must, therefore, refuse to hear Post's constitutional claims until they have been reviewed by the highest California court.

Post contends that he raised his federal constitutional claims before the state courts in his Motion to Recall Remittitur and his Petition for Review of

the Denial of Remittitur. The court of appeal's denial of an application to recall the remittitur, followed by the state supreme court's denial of a petition for hearing, exhaust a petitioner's state remedies as to his claim of ineffective assistance of appellate counsel. Hayward v. Stone, 496 F.2d 844, 846 (9th Cir. 1974). However, "[i]n all other circumstances, a denial without opinion of an application to recall the remittitur would be a denial on the procedural round that the incorrect remedy was sought and the exhaustion requirement would not be met." Id. Post's application for a recall of the remittitur, therefore, failed to exhaust his state remedies as to his due process claim. Because a federal habeas court must dismiss petitions containing both exhausted and unexhausted claims, Rose v. Lundy, 455 U.S. 509, 522 (1982), the

district court was correct in dismissing Post's habeas corpus petition.

AFFIRMED

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

Monte Lee Post,	)	No. 87-5879
Petitioner/Appellant,	)	D.C. # CV-86-7547RMT
v.	)	
LUIS GARCIA, et al.,	)	JUDGMENT
Respondent/Appellees.	)	

APPEAL from the United States District Court for the Central District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgement of the said District Court in this Cause be, and hereby is AFFIRMED.

Files and entered October 4, 1988

Not for Publication

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

Monte Lee Post, Petitioner/Appellant, v. LUIS GARCIA, et al., Respondent/Appellee.	)	No. 87-5879 ORDER

Before: NORRIS, HALL and KOZINSKI, Circuit Judges.

The petition for rehearing is denied. The full court has been advised of the suggestion for an en banc rehearing and no judge has requested a vote thereon. The suggestion for rehearing en banc is therefore rejected. Fed. R. App. P. 35(b).

Filed December 30, 1988.

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff/Respondent, vs. MONTE LEE POST, Defendant/Appellant.	No. 43254 S.C. No. A-148388 ORDER

THE COURT:

The appellant's motion to recall remittitur filed with this court on April 6, 1987 is denied.

Filed April 29, 1987.

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 5, Crim. No. 43254
S-000869

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

IN BANK

==========

PEOPLE

v.

MONTE LEE POST

==========

Appellant's petition for review DENIED.

PANELLI

Acting Chief Justice

Filed July 22, 1987

[A-148388, R.T.,903]

(Recess.)

THE COURT: All right, the record will reflect that Mr. Post is present in court with counsel. The People are present.

Will counsel stipulate that the jurors and alternates are seated in their respective seats, Mr. Clapp?

MR. CLAPP: So stipulated.

THE COURT: Mr. Fisher?

MR. FISHER: So stipulated.

THE COURT: All right, Mr. Clapp.

Q BY MR. CLAPP: Mr. Griffin--excuse me -- Dr. Griffin, I would like to ask you finally, your best medical opinion, based on reasonable medical certainty, could you please tell us whether or not you are of the opinion that Mr. Post was aware of his actions on the evening of May the 28th, during the time between, when he returned in his car until he arrived sometime later in the police station?

A I do not believe he was aware of his actions.....

[R.T., 904]

during that time frame.

Q Could you please tell me why, what reasons or what facts lead you to hold this opinion?

A I believe he was unconscious of a reasoning process of his brain.

[R.T., 972]

MR. CLAPP: Your Honor, at this point, I would renew my request for instruction 430, which deals with unconscious act, and I would again point to the Court to the last sentence in the second paragraph that defines what unconsciousness is and say that the words or any similar cause encompass the facts of this case and I believe that's the reason this unconsciousness instruction should be given.

THE COURT: All right, that motion will be denied.

THE COURT: And 841. All right, 840 and 841, the court will give.

842, 844. I'm deleting now 848.

417A --

MR. CLAPP: You're giving it? You're deleting it or giving it?

THE COURT: Deleting it.

MR. CLAPP: Okay.

THE COURT: I'm deleting 847. And do you want to be heard on that aspect?

MR. CLAPP: Yes, Your Honor. I believe that the -- that the instruction 847 entitled involuntary manslaughter, killing while unconscious due to voluntary intoxication should be given under this state of the facts in this case.

The evidence of the defendant and the psychiatrist both indicate that that is a viable issue and I believe it's presented and logically presented by the state of the case.

THE COURT: Okay, that will be denied.

I'm giving 850, 852 --

MR. CLAPP: In other words, you're also -- did we -- oh, yeah. Excuse me, Your Honor.

THE COURT: I'm giving 870, 871, 872, 873.

I'm giving 874, deleting the last reference to involuntary manslaughter or attempt involuntary manslaughter.

877. I'm giving 877 in its toto, but just inserting the word attempt.

Then we get into assault with a deadly weapon.

MR. CLAPP: Yesterday you indicated, Your Honor, that you were going to give 878, diminished capacity, irresistible impulse.

THE COURT: I indicated I would not. you asked for it.

MR. CLAPP: All right.

THE COURT: And you are asking for it again?

MR. CLAPP: Again.

THE COURT: Okay, the Court does not feel we are confronted with an irresistible impulse based on the evidence.

THE COURT: That will be denied. And, I might comment at this time in regards to your instruction request upon the unconsciousness aspect, the Court will city People versus Alexander which is in 182 Cal.App. 2nd. 281. The Court feels, based on that case, there is-- applying that case to the facts in this particular case, the Court does not feel that you are confronted with an unconscious situation.

All right then, I'm giving People's special instruction on diminished capacity. I'm giving 1702, 1719, personally used a firearm.

1720 --

MR. CLAPP: Defendant's interjected at this point an objection to the use of this particular instruction.

THE COURT: Okay. I made note of that and that will be denied.

[R.T., 1112]

THE COURT: Yes.
(At which time, 10:50 a.m., the jury retires to commence deliberations.)

[R.T., 1144]

THE COURT: All right. I wish I felt as comfortable as you did, Mr. Clapp, in that regard.

But first of all, in regards to In re Podesto, the Court feels that basically as far as any appeal in this matter, of course there will be an appeal, but the chances of overcoming an appeal on Court II, I think are quite remote, if anything, because of the fact that the Court allowed counsel practically everything he wanted as far as in the way of instructions and evidence and the admissibility of evidence.

.....The Court has heard the evidence and recalls.....

[R.T., 1145]

quite vividly most of the evidence that was presented. And, the Court was not thoroughly enamored with the reasons for the explanation, the explanation given by the client as to why he bought the gun, to put it mildly, I don't believe him when he said the reason for his buying the gun and the reason that he also gave during the course of his testimony why he placed it in his pocket.

There is no question in my mind that that gun was bought for the purpose for which it was used.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MONTE LEE POST, Petitioner, v. LUIS GARCIA, Respondent.	CASE NO. CV86-7547-RMT ORDER ADOPTING REPORTS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE

Pursuant to 28 U.S.C. Section 636(b)(1)(B) the Court has reviewed the Petition, all of the records and files herein and the attached Reports and Recommendations of the United States Magistrate. Objections to the Magistrate's Report and Recommendation have been filed herein. Having made a de novo determination of those portions of the Report and Recommendation to which objections have been made, the Court concurs with and adopts the findings and conclusions of the Magistrate.

IT IS ORDERED that Judgement be

entered dismissing the Petition without prejudice to the filing of a new Petition once state remedies have been fully exhausted by fairly presenting the federal issues to the highest court of the State of California.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this order, Reports and Recommendations and Judgement herein by United States Mail, on Petitioner and counsel for Respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: March 6, 1987

ROBERT M. TAKASUGI
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MONTE LEE POST, Petitioner, v. LUIS GARCIA, Respondent.	CASE NO. CV86-7547-RMT JUDGMENT

Pursuant to the Order of the Court adopting the findings, conclusions, and recommendations of the United States Magistrate.

IT IS ADJUDGED that the Petition for Writ of Habeas Corpus is dismissed without prejudice to the filing of a new Petition once state remedies have been fully exhausted by fairly presenting the federal issues to the highest court of the State of California.

Date: March 6, 1987

ROBERT M. TAKASUGI
UNITED STATES
DISTRICT JUDGE

Title 28 U.S.C., section 2254(a) - (d):

Section 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or

an office or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding

in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

PROOF OF SERVICE BY MAIL

[Supreme Court Rule 28]

STATE OF CALIFORNIA, COUNTY OF RIVERSIDE:

I am a resident of the aforesaid county; I am over the age of eighteen years and I am not a party to the within entitled action; my business address is:

P.O. Box 2122, Cathedral City, California 92234.

On April 21, 1989, I served the within,

PETITION FOR WRIT OF CERTIORARI ~~and MOTION TO VACATE JUDGMENT BELOW~~

on the interested parties or their attorney of record in said action, by placing three true copies thereof enclosed in a sealed envelope with first-class postage thereon fully prepaid, in the United States mail at Palm Springs, California, addressed as shown on the following page:

SEE LIST ON ATTACHED PAGE

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on April 21, 1989, at Palm Springs, Calif.

/s/

Signature, Barbara P. Post

Clerk,
United States Court of Appeals
For the Ninth Circuit
P.O. Box 547
San Francisco, CA 94101-0547

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88-1764

(2)

Supreme Court, U.S.
FILED
JUL 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1989
No. 88-1756

MONTE LEE POST,

Petitioner,

v.

LUIS GARCIA, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I

Whether petitioner has exhausted his state remedies when his state Petition for Writ of Habeas Corpus alleged only violations of state law while his Federal Petition for Writ of Habeas Corpus raised federal questions.

II

Whether petitioner's Motion to Recall the Remittitur, which was denied by the California Court of Appeal without citation and later denied on a Petition for Review to the California Supreme Court without citation exhausted his federal contentions where, because the Motion to Recall the Remittitur was not the proper vehicle for raising his contentions as the state courts would normally deny the motion for procedural reasons.

III

Whether the available state remedies requirement of the exhaustion doctrine mandates that state remedies must not only be available through the District Court proceedings but must remain available throughout subsequent federal appellate proceedings.

IV

Whether, where a petitioner instead of exhausting his available state remedies, which remain available after a district court judgment setting forth his remedies, waives his right to raise his contentions when he fails to follow the instructions to properly exhaust his remedies but instead proceeds with an appeal to the Ninth Circuit during which period he loses his state remedies.

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OPINIONS BELOW

The unpublished memorandum affirming the District Court's ruling appears as Appendix A in the Petition for Writ of Certiorari. The order of the Ninth Circuit Court of Appeals denying petitioner's Petition for Rehearing and Suggestion for Rehearing en banc, filed on December 30, 1988 appears as Appendix B in the Petition for Writ of Certiorari.

The judgment of the United States District Court for the Central District of California denying the Petition for Writ of Habeas Corpus without prejudice and the memorandum in support thereof, appears as Appendix A, herein.

JURISDICTION

On December 30, 1988,petitioner's Petition for Rehearing and suggestion for rehearing en banc was denied by the Ninth

Circuit Court of Appeal. (Petn. for Writ of Certiorari, Appendix B, p. 51.) This Court filed petitioner's Petition for Writ of Certiorari on March 27, 1989. Since the petition was filed within 90 days of a subject order of the Ninth Circuit, the petition was filed timely. (28 U.S.C. 2101(c).)

Jurisdiction is apparently invoked pursuant to section 1254(a) of Title 28 of the United States Code.

STATEMENT OF THE CASE

In an information filed by the Los Angeles County District Attorney, appellant was charged in count I with attempted murder in violation of California Penal Code sections 667 and 187 and in count II with assault by means of force likely to produce great bodily injury and with a deadly weapon in

violation of California Penal Code section 245(a). The victim in both counts was appellant's estranged wife. Both counts contained a personal use allegation alleging that petitioner personally used a firearm, to wit, a pistol, within the meaning of California Penal Code sections 12022.5 and 1203.06(a)(1). Following a trial by jury, petitioner was found guilty of assault by means of force likely to produce great bodily and with a deadly weapon as charged in count II of the information. The jury further found true the use allegation. The jury announced it was hopelessly deadlocked as to count I and the trial court declared a mistrial as to count I only. Probation was denied and petitioner was sentenced to state prison for a total term of five years. (Clerk's Record from the Federal Docket sheet,

referred to by the Ninth Circuit and hereinafter as CR, CR 5, P. 10)

The California Court of Appeal, Second Appellate District, Division Five, affirmed the judgment. (CR 5, p. 11.) Petitioner filed a Petition for Review from the Court of Appeal judgment in the California Supreme Court. (CR 5, p. 29.) The California Supreme Court denied the Petition without citation. (CR p. 4.)

Petitioner filed a Petition for Writ of Habeas Corpus in the California Supreme Court. (CR 5, p. 52.) The California Supreme Court denied the Petition for Writ of Habeas Corpus. In the order denying the petition, the court cited In re Terry (1971) 4 Cal.3d 911, 917 and California Rules of Court, Rule 32, subdivision (b). (CR 5, p. 96.)

Petitioner filed a Petition for Writ

of Habeas Corpus in the United States District Court for the Central District of California. (CR 1.) An order to show cause was issued, directing respondent to file a Return to the Petition on the issue of exhaustion or if exhaustion is conceded, then on the merits. (CR 3) Respondent filed a return arguing only that the petition be dismissed because Petitioner failed to exhaust his state remedies. (CR 5.) Petitioner filed a traverse to Return of the Petition. (CR 6.) On January 20, 1987, the United States Magistrate filed his Report and Recommendation in which it was recommended that the petition be dismissed without prejudice to allow the filing of a new petition once state remedies have been fully exhausted by fairly presenting the federal issues to the highest court of the

State of California. (Appena. A;CR 8.) Petitioner filed objections to the Magistrate's Report and Recommendation. (CR 9 and 10.) Having read Petitioner's objections, the Magistrate did not change his recommendation that the Petition be dismissed. (App. A; CR 11.) United States District Court Judge Robert M. Takasugi concurred with and adopted the findings and conclusions of the Magistrate. (CR 13)

The District Court, pursuant to Title 28, section 2253 of the United States Code and Federal Rules of Appellate Procedure 22(b), ordered that the certificate of probable cause be denied. (CR 15.) On May 14, 1987, Petitioner requested the United States Court of Appeal for the Ninth Circuit to issue a certificate of probable cause. On July 7, 1987, the

Court of Appeal for the Ninth Circuit issued a certificate of probable cause, thereby conferring jurisdiction pursuant to Title 28, section 2253 of the United States Code. (CR 18.)

While his appeal was pending in the Ninth Circuit Court of Appeals, petitioner submitted an application to the California Court of Appeal to recall the remittitur. (Motion to Recall Remittitur; Memorandum of Points and Authorities, *People* v. *Post*, No. 2D Crim. 43254 (Apr. 6, 1987), 3 CR., Exh. X; see also Pet. for Writ of Cert., App. A, pp 44-45.) After the Court of Appeal denied this application without an opinion, petitioner petitioned to the California Supreme Court to review the denial. The Petition for review was denied without an opinion. (Pet. for Writ of Cert., App.C.) Petitioner also filed a

state Petition for Writ of Habeas Corpus in the Superior Court of California. The Superior court denied the petition without hearing. Petitioner did not seek review of this petition. (see, Pet for Writ of Cert., App. A, pp. 42-43, fn.1.)

On October 4, 1988, following submission of the briefs and oral argument, the Ninth Circuit issued a memorandum, not for publication, affirming the District Court's dismissal of petitioner's Petition for Writ of Habeas Corpus, without prejudice, until petitioner has exhausted his available state remedies. (Pet. for Writ of Cert., App. A.)

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied for several reasons. The District Court and the Ninth Circuit Courts of Appeal properly found that petitioner's contentions in the state courts alleged misapplication of state law and violations of the state constitution and thus the federal claims petitioner now attempts to assert in his federal petition were never fairly presented to the California Courts. The Ninth Circuit Court of Appeals, in an unpublished memorandum, properly found that petitioner's Motion to Recall the Remittitur filed in the state courts while his appeal in the Ninth Circuit was pending, did not exhaust his available state remedies. The Ninth Circuit, relying on its previous opinion in *Hayward*

v. *Stone*, 496 F.2d 844, 846 (9th Cir. 1974) properly found that a denial without opinion of an application to recall the remittitur in California is generally a denial on procedural grounds that the incorrect remedy was sought and thus the exhaustion requirement has not been met.

At the time petitioner filed his Petition for Writ of Habeas Corpus in the District Court and at the time the District Court denied, without prejudice, this Petition, petitioner did have an available state remedy, in that, he was still in state custody and could have filed a state Petition for Writ of Habeas Corpus alleging his federal contentions. Petitioner was specifically instructed by the District Court and by respondents in the Return that he had an available state remedy by way of state Petition for Writ

of Habeas Corpus. (App. A; CR 5.)

However, petitioner did not follow the instructions of the District Court and instead chose to exhaust his remedies by way of a Motion to Recall the Remittitur. As noted earlier, a denial of a Motion to Recall the Remittitur without citation is a denial on procedural grounds and the exhaustion requirements have not been met.

Petitioner cannot be heard to complain that he has no available state remedies because he is no longer in state custody when it has been his own actions which caused the unavailability of state remedies. The District Court properly found, and the evidence demonstrates, petitioner knew as early as 1983, three years prior to the filing of his federal petition in District Court, of the federal contentions he sought to raise. (App. A)

The three year delay can only be attributable to petitioner's inactions.

Petitioner cannot contend the exhaustion requirements have been met because he no longer has available state remedies when his intentional actions and inactions caused the remedy to be unavailable. Thus, there are no extraordinary circumstances to excuse the exhaustion requirements.

The unpublished memorandum of the Ninth Circuit does not create new law nor does it seek to resolve a conflict within the circuit. Furthermore, contrary to petitioner's assertions, capacity to commit a crime is not an element of the crime that appellant was found guilty. As such, petitioner has failed to state a federal question which would entitle him to habeas corpus relief. The Petition for

Writ of Certiorari should be denied.

ARGUMENT

I

PETITIONER HAS FAILED TO EXHAUST HIS STATE REMEDIES, THE PETITION WAS PROPERLY DISMISSED

A. Petitioner has failed to present his federal contentions to the state's highest court

In order to exhaust state remedies the legal and factual bases of the federal contentions must have been presented to the state's highest court. (*Anderson* v. *Harless*, 459 U.S. 4, 7-8, 103 S.Ct. 276, 277-278, 74 L.Ed.2d 3, 7-8 (1982).) Moreover, in order to obtain a decision on the merits of any of his federal contentions, petitioner must have fairly presented each of his federal contentions to the state's highest court. (*Rose* v. *Lundy* 455 U.S. 509, 522, 102 S.Ct. 1198,

1205, 71 L.Ed.2d 379, 390 (1982).)

The contention raised in the Petition for Writ of Habeas Corpus in the California Supreme Court differs from the federal contention petitioner now claims. (See CR 5, p. 52.) In petitioner's Writ of Habeas Corpus to the California Supreme Court he contended that under California law the trial court erroneously failed to give sua sponte an instruction on involuntary intoxication and erroneously refused to give this instruction when requested. Petitioner asserted that the evidence warranted the instruction and the trial court erred in failing to give the instructions. Petitioner cited to no federal due process violation in his Petition for Habeas Corpus to the California Supreme Court. (See CR 5, pp. 56-57,78-88.)

In his petition to the District Court, petitioner contended for the first time that the trial court had no discretion to look at the evidence and determine if the requested instruction should in fact have been given. (CR 1, pp. 4-5, 7.) The California Constitution, Article VI, section 10 and California Penal Code section 1127 grants the trial court the authority to make the exercise of discretion now challenged. The contention in the federal writ attacked for the first time the authority of the trial court to even determine if the evidence warranted the requested instruction. This is vastly different from the previous argument to the California Supreme Court in his Petition for Writ of Habeas Corpus which necessarily conceded the trial court's

discretionary authority under state law to determine if the evidence warranted the requested instruction in arguing that the court abused its discretion in not giving the requseted instuction. The California state courts should be given the first opportunity to interpret its' state constitutional provisions and state statues.

Petitioner contended in his writ to the District Court that the trial court's refusal to charge the jury with the requested jury instruction on involuntary intoxication relieved the prosecution of its burden of proving petitioner's capacity to commit the crimes alleged. Petitioner argued for the first time that capacity was an element of the crime charged and the people had the burden of proving it. Therefore, the trial court's

refusal to give the requested jury instructions violated federal due process because it unconstitutionally relieved the prosecution of its burden of proving every element of the offense beyond a reasonable doubt, including the capacity to commit the offense. (CR 1, pp. 2-4.) This federal contention was never raised in the Petition for Habeas Corpus to the California Supreme Court.

Petitioner argued in the state court that the errors were prejudicial because they deprived him of a complete defense to the charges, not that the error impermissibly shifted the burden to petitioner to prove an element of the crime, as he argued in his federal petition. (CR 5, p. 87-88.) Moreover, under California law, capacity has been found not to be an element of a crime, but

an affirmative defense which the defendant has the burden of proving. (*People* v. *Boyes*, 149 Cal.App.3d 812, 817-821, 197 Cal.Rptr. 105 (1983).) This federal contention is clearly a separate issue from that raised in the state courts. (*Engle* v. *Isaac*, 456 U.S. 107, 120, 102 S.Ct. 1558, 1568-1569, 71 L.Ed.2d 783 (1982).)

Thus, under *Anderson* v. *Harless*, *supra*, 459 U.S. 4, 7-8, 103 S.Ct. 276, 277-278, there is a clear failure to exhaust state remedies in that the federal bases of the contention presented to the federal court was not raised in the state courts. (see also, *Picard* v. *Connor*, 404 U.S. 270, 276, 92 S.Ct. 509, 512-513, 30 L.Ed.2d 438, 444 (1971).)

In addition, where there is a federal decision subsequent to the petitioner's

application for relief in the state courts, and such decision changes the law, the petitioner must afford the state courts the opportunity to determine the subject issue in light of the change in federal law. (*Picard* v. *Connor*, 404 U.S. 270, 276, 92 S.Ct. 509, 512-513, 30 L.Ed.2d 438, 444 (1971). ; *Blair* v. *People of the State of California*, 340 F.2d 741, 745 (9th Cir. 1965).)

In the present case, this court's decision in *Rose* v. *Clark* 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986), explaining and establishing the standard of error for when a jury was not instructed on an element of a crime, was issued after petitioner filed his state papers. (see also, *People* v. *Lee*, 43 Cal. 3d 666, 671-674, __ Cal. Rptr. __ (1987).)

Assuming arguendo, the trial court's failure to give the contended jury instructions resulted in the improper shifting of the burden of proof to the accused by presuming capacity, then the California courts should have an opportunity to not only review this issue, but review the issue in light of *Rose* v. *Clark* 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986).

B. The Court Of Appeals, Ninth Circuit, Correctly Found That Petitioner's Motion To Recall The Remittitur And His Petition For Review Of The Denial Of Remittitur Filed In The State Court Did Not Exhaust His State Remedies

When the District Court denied petitioner's Petition for Writ of Habeas

Corpus, without prejudice, it instructed petitioner that he still had a remedy in the California Courts by way of a state Petition for Writ of Habeas Corpus. (App. A.)

Respondents set forth in the Return in the District Court (CR 5) that petitioner had a viable state remedy in that state courts would have entertained a Petition for Writ of Habeas Corpus on the issue of whether petitioner could obtain relief from the federal courts. (*In re Domingo* 268 Cal.App.2d 642, 648, 74 Cal.Rptr. 161 (1969).) Also the issue of whether fundamental constitutional rights have been violated would have been entertained by state courts in a Petition for Writ of Habeas Corpus. (*People* v. *Sorenson* 111 Cal.App.2d 404, 405, 244 P.2d 734 (1952); see also *In re Ali* 230

Cal.App.2d 585, 590, 41 Cal.Rptr. 108 (1964).)

While petitioner's appeal was pending in the Ninth Circuit, he filed a motion in the California Court of Appeal to recall the remittitur. An application of recall of Remittitur is a California post-conviction remedy allowing petitioner to request the Court of Appeal to re-assert its jurisdiction over his case. (See Cal. Rules of Court, rule 25(b).)

In his motion, petitioner alleged that he had been denied his federal constitutional rights to a trial by jury, to a fair trial and to effective assistance of counsel at both the trial and appellate level. (Motion to recall Remittitur; Memorandum of Points and Authorities, *People* v. *Post*, No. 2d Crim. 43254 (Apr. 6, 1987), 3 CR., Exh. X; Pet.

for Writ of Cert, App. A. p.45) After the Court of Appeal denied this application without an opinion, petitioner petitioned to the California Supreme Court to review the denial. This petition was also denied without an opinion or citation. (Pet. for Writ of Cert., App. C,p.53.)

In California a Motion to Recall the Remittitur is an extraordinary remedy wherein the judgment sought to be recalled is alleged to have been secured by fraud or imposition on the court and, generally, an error of law does not authorize the recalling of a Remittitur. (*People* v. *Randazzo*, 48 Cal.2d 484, 488, 310 P.2d 413 (1957); *People* v. *Mutch*, 4 Cal.3d 389, 396, 93 Cal.Rptr. 721 (1971).) An exception to the general rule however is made when the error is of such dimensions to entitle the defendant to a Petition for

Writ of Habeas Corpus and where ineffective representation on appeal precluded petitioner from the benefit of raising the issue(s). (See e.g. *People* v. *Mutch, surpa*, 4 Cal.3d at 396-395; *In re Martin*, 58 Cal.2d 133, 23 Cal.Rptr. 167 (1962); B. Witkin, *California Criminal Procedure*, § 735, p. 704 (1963).)

Thus the denial of the motion to recall the remittitur and the denial of the petition for review from the denial order of the California Court of Appeal does not satisfy the exhaustion requirement herein. (see, *Hayward* v. *Stone* 496 F.2d 844, 846 (9th Cir., 1974).)

The court in *Hayward* thoroughly sets forth the California proceeding relative to motions to recall the remittitur. (*Id.*) As can be seen from said case the only proper application of a Motion to

Recall the Remittitur is where it is contended that the failure to provide appellate counsel or to remedy inadequate appellate counsel and not errors of law as contended by petitioner in his Motion to Recall the Remittitur.

Therefore, unless specifically noted by the state court as a denial on the merits, a denial of the Remittitur without citation will be presumed a denial on procedural grounds that the incorrect remedy was sought.

Allegations alleging the prosecution was unconstitutionally relieved of proving beyond a reasonable doubt every element of the crime (*Rose* v. *Clark*, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986)) and allegations alleging appellate counsel was ineffective (*Strickland* v. *Washington* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674

(1984).) are two separate issues and exhaustion of one cannot be presumed to be exhaustion of the other. (*Rose* v. *Lundy*, supra, 455 U.S. 509, 522, 102 S.Ct. 1198, 1205; *Anderson* v. *Harless*, supra, 459 U.S. 4, 103 S.Ct. 276.)

The Ninth Circuit here properly ruled that the denial of Petitioner's Motion to Recall the Remittitur did not exhaust his state remedies with regards to his federal due process claim concerning the trial court's failure to give the requested jury instruction.

C. **At The Time Petitioner Filed His Petition For Writ Of Habeas Corpus In The District Court Petitioner Had Available State Remedies By Way Of State Petition For Writ Of Habeas Corpus**

Petitioner urges this Court to accept the Writ of Certiorari and excuse the exhaustion requirements because he no longer has an available state remedy becaues he was released from state custody on April 30, 1988. (Petn. for Writ of Certiorari, p. 17.) Respondent however, submits, that petitioner's failure to allege his federal contention to the state's highest court, was brought about by petitioner's own intentional delay and subsequent failure to follow proper procedure. Thus, petitioner waived his

right to exhaust in the state courts and cannot argue to be excused from the exhaustion requirements.

The requirement that a petitioner exhaust his remedies "available in the courts of the state," refers only to remedies still available in the courts at the time of the federal petition was originally filed. (*Engle* v. *Isaac*, 456 U.S. 107, 125, fn. 28, 102 S.Ct. 1588, 1570, fn. 28, 71 L.Ed.2d 783 (1982); *Fay* v. *Noia*, 372 U.S. 391, 435, 83 S.Ct. 822, 847, 9 L.Ed.2d 837 (1963).)

In its initial report and recommendation, the magistrate found that petitioner had not exhausted his federal claims in that his assertions in the state court, based upon California law and the California Constitution, failed to state any federal contention and as such

petitioner failed to exhaust his state remedies. (App. A) In his objections to the magistrate's report and recommendation, petitioner alleged that his failure to raise his federal contentions in the state court was due to the ineffective assistance of appellate counsel in refusing to raise the federal contentions. (Id., CR 9 & 10.)

In its final report and recommendation, the District Court noted that not only had petitioner not exhausted his available state remedies with regards to the ineffective assistance of appellate counsel claim, it further noted that appellant counsel could not be blamed for petitioner's failure to bring this issue to the state's highest court. The magistrate found that based upon the attachments to petitioner's own

objections, it appeared that petitioner had known of his federal contentions and the possible failure to raise these federal contentions in the state courts for at least three years (1983) prior to the filing of this ferderal petition. (App. A.)

Petitioner was instructed by the District Court that he still had an available state remedy in that he still may file a Petition for Writ of Habeas Corpus in the California Courts addressing his federal questions. Respondents, in our Return to Petition for Writ of Habeas Corpus and Memorandum of Points and Authorities in support thereof also noted that petitioner had a viable state remedy by way of state Petition for Writ of Habeas Corpus to redress his federal contentions. (*In re Domingo, supra*, 268

Cal.App.2d 642, 648, 47 Cal.Rptr. 161; *In re Ali*, *supra*, 230 Cal.App.2d 585, 590, 41 Cal.Rptr. 108; *People* v. *Sorensen*, *supra*, 111 Cal.App.2d 404, 405, 244 P.2d 734.)

Instead of filing a state Petition for Writ of Habeas Corpus, as instructed by the District Court, petitioner sought to exhaust his remedies by way of Motion to Recall the Remittitur. As shown earlier, the case law is very clear that this was an ineffective way of exhausting his federal claims on the merits in state court.

By filing a Motion to Recall the Remittitur and attempting to exhaust his rememdies petitioner impliedly acknowledged the correctness of the District Court's ruling that he had not exhausted his available state remedies.

This Court in *Engle* v. *Isaac*, *supra*, 456 U.S. 107, 128, 102 S.Ct. 1558, 1572, held that any state prisoner bringing a constitutional claim to the federal courts after a state procedural default must demonstrate cause and actual prejudice before obtaining relief. (See also *Wainwright* v. *Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).)

As shown by his Motion to Recall the Remittitur, petitioner had ample opportunity to file a state Petition for Writ of Habeas Corpus in the California Supreme Court, thereby exhausting his state remedies, before he was released from state custody and procedurally barred by the state from filing such a petition. Petitioner here was the "cause" of the procedural default and thus has waived exhaustion and cannot be granted relief

from the exhaustion requirements. (*Engle* v. *Isaac*, *supra*, 456 U.S. at 129, 102 S.Ct. at 1572-3; *Fay* v. *Noai*, *supra*, 372 U.S. 391, 438-439, 83 S.Ct. 822, 848-849.)

Furthermore, as the District Court properly noted, appellant had known for three years about the desire to raise his federal contentions and the need to raise them in state court and did not act upon them. The lapse of time can only be attributed to petitioner's own inaction. If petitioner had acted earlier in raising his federal contentions in the state courts he would have had ample opportunity to exhaust his state remedies before he was procedurally barred.

It has been petitioner's intentional inactions and actions which has "caused" him to be procedurally barred by the state courts from filing a Petition

for Writ of Habeas Corpus thereby exhausting his state remedies. At the time petitioner filed his Federal Writ of Habeas Corpus in the District Court and at the time the District Court denied the writ without prejudice, petitioner had available state remedies. Because petitioner's inability to exhaust his available state remedies was brought about by his own intentional inactions and actions and thus is the cause of the state procedural default, he cannot be heard to complain on appeal that this Court hear his Petition for Writ of Habeas Corpus because he no longer has any available state remedies. (*Engle* v. *Isaac*, *supra*, 456 U.S. at 129, 102 S.Ct. at 1572; *Fay* v. *Noai*, *supra*, 372 U.S. 391, 438-439, 83 S.Ct. 822, 848-849.)

II

REVIEW BY THIS COURT IS UNNECESSARY AS PETITIONER HAS FAILED TO STATE A FEDERAL CONTENTION WHICH WOULD HAVE ENTITLED HIM TO FEDERAL HABEAS CORPUS RELIEF

Petitioner argued in his Petition for Writ of Habeas Corpus in the United States District Court that the trial court's refusal to instruct on unconsciousness/involuntary intoxication removed a material issue of fact from the jury's consideration thereby violating petitioner's right to a jury trial under both the California and United States Constitutions. In support of this claim, petitioner argued that the trial court's refusal to give a requested jury instruction relieved the prosecution of its burden of proving every element of the offense beyond a reasonable doubt, that being capacity, thus violating

petitioner's right to due process. (CR 1, p. 32.)

Petitioner's due process argument fails in that consciousness is not an element of the crimes he was charged with or found guilty of. (*People* v. *Boyes*, 149 Cal.App.3d 814, 197 Cal.Rptr. 105 (1983).) Under federal, like California, unconsciousness due to involuntary intoxication is not an element of the crime charged but an affirmative defense. (*United States* v. *F.D.L.*, 836 F.2d 1113, 1116-1117 (9th Cir. 1988); *United States* v. *Henderson*, 680 F.2d 659 (9th Cir. 1982).)

The state possesses the primary authority for defining its laws and enforcing its criminal laws. (*Engle* v. *Isaac*, *supra*, 456 U.S. 107, 128, 102 S.Ct. 1558, 71 L.Ed.2d 793 (1982); *Jackson* v.

Virginia 433 U.S. 307, 324, fn.16, 99 S.Ct. 2781, 2792, fn.16, 61 L.Ed.2d 560 (1979).) Because consciousness was not an element of the crime, the People had no burden of proving it, thus petitioner was not deprived of his due process rights under the federal constitution. (*Engle* v. *Isaac, supra*, 456 U.S. 107, 120, 102 S.Ct. 1558, 1567; *Patterson* v. *New York*, 432 U.S. 197, 212, 97 S.Ct. 2319, 2327, 53 L.Ed.2d 281 (1977); *Gilcrist* v. *Kincheloe*, 589 F.Supp. 291 (E.D. WA.1984), affirmed 774 F.2d 1173 (9th Cir. 1985); *People* v. *Boyes, supra*, 149 Cal.App.3d 814.)

Because petitioner has not raised a federal question, this Court need not even reach the exhaustion and waiver issues.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

DATED: July 12, 1989

Respectfully Submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MONTE LEE POST, Petitioner, v. LUIS GARCIA, Respondent.	CASE NO. CV86-7547 RMT (RWR) FINAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

This Final Report and Recommendation and the attached Report and Recommendation are submitted pursuant to the provisions of 28 U.S.C. Section 636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

On January 20, 1987, the Clerk filed Notice of Filing of Magistrate's Report and Recommendation and the Lodging of Proposed Judgment, which was served on the parties together with copies of the said

Report and Recommendation.

Petitioner has timely filed his Objections to the Report and Recommendation. The Magistrate has carefully read and considered Petitioner's Objections, but he is not persuaded to modify his recommendation in any respect. Petitioner's Objections allege, in essence, that he should be excused from the exhaustion requirement (1) on the grounds that his California appointed attorney was incompetent and (2) that the California Court of Appeals and Supreme Court should have know, sua sponte, that his argument addressed a federal constitutional question when, in actuality, it only addressed an interpretation of California law. Petitioner's Objections are wholly without merit. Not only has he misperceived the

thrust of the Report and Recommendation concerning a full and fair presentation of his federal contentions to the state courts, but his present posture of claiming the reason for not complying with the exhaustion requirement was due to ineffective appellate counsel also misses the point since he has not exhausted that contention in the state system. Petitioner's remaining allegation is that, if he were required to return to the state system to exhaust his state remedies, he will probably be released before the exhaustion requirement can be satisfied and the petition would be moot. This argument is no justification for waiving the exhaustion requirement, as it applies to Petitioner in this particular situation. From a review of the attachments to Petitioner's Objections, it

appears that he has known of the possible failure to raise these federal contentions for at least three years. All of the issues set forth in Petitioner's Objections have been more than adequately addressed in the original Report and Recommendation. The issues presented by petitioner have been, and must be, decided adversely to him.

IT IS THEREFORE THE FINAL RECOMMENDATION OF THE MAGISTRATE that an Order be issued by the Court (1) approving these Reports and Recommendations, and (2) directing that Judgment be entered dismissing the Petition without prejudice to the filing of a new Petition once state remedies have been fully exhausted by fairly presenting the federal issues to the highest court of the State of California.

Dated: February 27, 1987

/S/
RONALD W. ROSE
United States Magistrate

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MONTE LEE POST, Petitioner, v. LUIS GARCIA, Respondent.	CASE NO. CV86-7547 RMT (RWR) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE ON A PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

This Report and Recommendation is submitted pursuant to the provisions of 28 U.S.C. Section 636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

BACKGROUND

Petitioner, pro se but paying the filing fee, commenced this action on November 19, 1986 by filing a Petition for Writ of Habeas Corpus by a Person in State

Custody. A Return and Traverse have been timely filed. No evidentiary hearing has been conducted.

For reasons which will be discussed below, the Magistrate recommends dismissal of the Petition for failure to exhaust state remedies. Petitioner's contentions have been presented to the highest court of the State of California, but there has been a failure to fairly present the federal questions and have them resolved on the merits, in any state court proceeding. To sufficiently appreciate the failure of Petitioner to comply with the federal question exhaustion doctrine announced in Anderson v. Harless, 459 U.S. 4, 6, 103 S.Ct. 276, 277, 74 L.Ed.2d 3 (1982), it is necessary to compare Petitioner's present contentions, side-by-side with those allegedly similar

contentions presented on his direct appeal and in his petition for writ of habeas corpus before the California Supreme Court.

PETITIONER'S CONTENTIONS

1. (As presented herein) The trial court's refusal to instruct on unconsciousness/involuntary intoxication removed a material issue of fact from the jury's consideration, violating Petitioner's right to a jury trial under both the California and United States Constitutions.

CONTENTION AS PRESENTED TO THE CALIFORNIA SUPREME COURT ON PETITION FOR HEARING AFTER DENIAL OF HIS DIRECT APPEAL BY THE CALIFORNIA COURT OF APPEALS.

1. The trial court committed reversible error in refusing to instruct the jury on unconsciousness as a complete

defense. (Footnote one.)

PETITIONER'S CONTENTION AS PRESENTED TO THE CALIFORNIA SUPREME COURT IN HIS PETITION FOR WRIT OF HABEAS CORPUS.

1. Numerous reversible trial court errors which could have led to an acquittal (failure to send requested instructions). (Footnote two.)

> As a matter of comity, a federal court will not grant a state prisoner's petition for writ of habeas corpus unless it appears that the petitioner has exhausted available state remedies ... State remedies have not been exhausted unless the petitioner's federal claim has been `fairly presented to the state courts,' ... and the highest state court has disposed

of the claim on the merits ... (cites omitted). Carothers v. Rhay, 594 F.2d 225, 228 (9th Cir. 1979).

In order to fairly present the federal contentions to the state's highest court the substance of the factual and legal bases of the federal contentions must have been presented to the state court. Anderson v. Harless, 459 U.S. 4, 6-8, 103 S.Ct. 276, 277-78, 74 L.Ed.2d 3 (1982); Allbee v. Cupp, 716 F.2d 635, 636-37 (9th Cir. 1983); Pappageorge v. Sumner, 688 F.2d 1294, 1295 (9th Cir. 1982), (Ely, J., concurring), cert. denied, 495 U.S. 1219, 103 S.Ct. 1223, 75 L.Ed.2d 459 (1983).

Although it is a settled rule, as advanced by Petitioner in his Traverse, that habeas petitioners do not have to

quote "book and verse on the federal Constitution", Picard v. Connor, 404 U.S. 270, 278, 92 S.Ct. 509, 513, 30 L.Ed.2d 438 (1971), to satisfy the federal question test, even a cursory analysis of the issue presented mandates the conclusion that his present efforts seek to establish a denial of due process in violation of the Fourteenth Amendment of the United States Constitution, when all of his state issues are directed toward errors committed by the state judge which were argued to be in violation of the California Constitution.

In this case, which is analogous to Picard v. Connor, supra, there can be no basis for an argument that a miscarriage of justice under California law is the equivalent of a violation of federal due process. See Picard v. Connor, 404 U.S.

at 278, 92 S.Ct. at 513.

> . . . [I] is not sufficient merely that the federal habeas applicant has been through the state courts. The rule [of exhaustion] would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts. 404 U.S. at 275-276, 92 S.Ct. at 512.

Petitioner's arguments to the California Supreme Court were directed toward his perceived violations of the California State Constitution which deals with a miscarriage of justice. The judges of the state courts were never obligated to decide whether, in this case, a "miscarriage of justice" under California law was the equivalent of a due process

violation under the federal Constitution. Without a ruling by the California Supreme Court, either could be greater or lesser than the other. Comity dictates that his decision first be made by the California Supreme Court or that court at least have an opportunity to address this issue before denying it on the merits.

For the above reasons, the merits of the present application have not been reached. It appears that Petitioner may still file a petition for writ of habeas corpus in the California courts, clearly addressing his federal questions, as well as the perceived violation of jury instructions addressed in Rose v. Clark, __ U.S. __, 106 S.Ct. 3101, 92 L.Ed.2d 460 (19[86]).

The Magistrate finds that by reason of the foregoing, and pursuant to 28

U.S.C. Section 2243, Petitioner is not now entitled to writ of habeas corpus from this Court.

IT IS THEREFORE RECOMMENDED that an Order be issued by the Court (1) approving and adopting this Report and Recommendation and (2) dismissing the Petition without prejudice to the filing of a new Petition once state remedies have been fully exhausted by fairly presenting the federal issues to the highest court of the State of California.

Dated: January 20, 1987

/S/
RONALD W. ROSE
UNITED STATES MAGISTRATE

FOOTNOTES

1. In Petitioner's Points and Authorities for rehearing before the California Supreme Court, he relied solely on the California Penal Code, California case authority and the California Constitution, Article VI, Section 4 1/2, 13.

2. Again, the only authority cited in Petitioner's brief before the California Supreme Court were California case authority and the California Constitution.

DECLARATION OF SERVICE BY MAIL

I, JOSEPHINE D. ROSE, declare that I am over 18 years of age, and not a party to the within cause; my business adress is 3580 Wilshire Boulevard, Los Angeles, California 90010; I served a copy of the attached **RESPONDENT'S BRIEF IN OPPOSITION** on each of the following, by placing same in an envelope addressed as follows:

Three copies to:
Monte Lee Post
P.O. Box 2122
Cathedral City, CA

One Copy to:
United States Court of Appeals
7th and Mission Streets
San Francisco, CA 94101

United States District Court
312 N. Spring Street
Los Angeles, CA 90012

Each said envelope was then, on JUL 1 2 1989 sealed and deposited in the United States Mail at Los Angeles, alifornia, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JUL 1 2 1989 at Los Angeles, California

CDF:rm

JOSEPHINE D. ROSE
DECLARANT

COPY

Supreme Court, U.S.
FILED
JUL 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1764

==========

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

MONTE LEE POST, Petitioner,

v.

LUIS GARCIA,

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT,

and the

ATTORNEY GENERAL OF THE STATE OF
CALIFORNIA, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

==========

REPLY TO BRIEF IN OPPOSITION

MONTE LEE POST
P.O. BOX 2122
CATHEDRAL CITY, CALIFORNIA
92235-2122
(619) 321-9210

(PETITIONER IN PRO SE)

QUESTIONS PRESENTED

Petitioner hereby reiterates those questions presented in his initial petition, and herein adds the following question.

1. Whether a motion to recall the remittitur followed by a petition for review to the state's highest court is sufficient to exhaust federal claims in the California state courts when such remedy is available by statute; and when the state courts could have treated such applications as a petition for writ of habeas corpus, but instead, chose to ignore the federal constitutional issues and claims contained therein; and when all the legal and factual basis of a federal petitioner's petition for writ of habeas corpus in the district court was the same as those presented to the state's highest court in the above stated applications?

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OPINIONS BELOW

The opinions and judgments from the courts below, are as noted on p. 38 of the Petition for Writ of Certiorari and contained in the appendices thereof.

JURISDICTION

Jurisdiction of this Court has not been disputed.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

The Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations, are as stated on pp. 4-6 of the petition.

STATEMENT OF THE CASE

The Statement of the Case is as noted in the petition and the Respondent's Brief in Opposition, along with the following additional information.

Petitioner did not appeal the superior court's summary denial of Petitioner's state Petition for Writ of

Habeas Corpus because pursuant to California Penal Code, section 1506, only the **People** have the right of appeal from an order of the superior court on a petition for writ of habeas corpus.

Instead, Petitioner chose the Motion to Recall the Remittitur, pursuant to California Rules of Court, Rule 25(d), which was a viable procedure to have the appeal reinstated per the California Supreme Court's own case law. See In re Smith, 3 Cal.3d 192, 203, 204 [90 Cal.Rptr. 1, 474 P.2d 969] (1970), where the California Supreme Court ordered the appeal reinstated because one of the issues was the denial of effective assistance of counsel on appeal.

There were no **specific instructions** that Petitioner could only exhaust state remedies by way of habeas corpus. (Brief of Resp. in Opp., pp. 2, 17, 18, 28, 37, 38; Pet., App. C, pp. 60-62).

ARGUMENT IN REPLY TO RESPONDENT'S BRIEF

1. Petitioner has fully and fairly presented his federal constitutional claims to the state's highest court in his motion to recall the remittitur and petition for review thereon.

A motion to recall the remittitur is a viable means of state exhaustion where ineffective counsel on appeal is at issue. In re Smith, 3 Cal.3d 192, 203-204 [90 Cal.Rptr. 1, 474 P.2d 969] (1970); Hayward v. Stone, 496 F.2d 844, 845-846; Calif. Rules of Court, Rule 25(d). An issue, which the Respondent has in fact conceded. (Brief of Resp. in Opp., pp. 30-31). Petitioner's motion to recall the remittitur presented not only the issue of ineffective counsel on appeal, but also the denial of a trial by jury, which is a denial of a fundamental federal right, and not just an error of law, as the Respondent wishes to have

this Court decide. (Brief of Resp. in Opp., pp. 30-31); (Post v. Garcia, et al., 9th Cir. No. 87-5879, Request for Cert. Prob. Cause, Exhibit "X").

Furthermore, Petitioner's motion to recall the remittitur could have been treated as a petition for writ of habeas corpus by the state courts. People v. Mutch, 4 Cal.3d 389, 396-397 [93 Cal. Rptr. 721, 482 P.2d 633] (1971).

Respondent now argues that the state courts should be given the opportunity to review Petitioner's federal claims in light of Rose v. Clark, 478 U.S. 570 [92 L.Ed.2d 460, 106 S.Ct. 3101] (1986), (Brief of Resp. in Opp., p. 27), when in fact, the state courts had all the necessary facts, substance, issues, or whatever else the state's highest court needed to apply controlling legal principles to Petitioner's federal claims in Petitioner's motion to recall the

remittitur and petition for review.

However, the state courts chose not to treat Petitioner's motion to recall the remittitur as a petition for writ of habeas corpus and decide those issues. (Pet., App. C, pp. 52-53). People v. Mutch, supra at 4 Cal.3d 396-397. Nor has the Respondent offered any explaination of why the state courts chose to ignore Petitioner's federal claims fully and fairly presented to them in Petitioner's motion to recall the remittitur and petition for review to the state's highest court. Smith v. Digmon, 434 U.S. 332, 333-334 [54 L.Ed.2d 582, 98 S.Ct. 597] (1978).

Moreover, by not giving Petitioner an opportunity to vindicate his federal claims, the lower federal and state courts' have effectively relieved the state of its' burden of proof as the beneficiary of those claims. Chapman v.

California, 386 U.S. 18, 23-24, 43 [17 L.Ed.2d 705, 87 S.Ct. 824] (1967), reh. den. 386 U.S. 987; Henry v. Mississippi, 379 U.S. 443, 447-448 [13 L.Ed.2d 408, 85 S.Ct. 564] (1965), reh.den. 380 U.S. 926; Humphrey v. Cady, 405 U.S. 504, 516 fn18, 517 [31 L.Ed.2d 394, 92 S.Ct. 1048] (1972); Sanders v. U.S., 373 U.S. 1, 8 [10 L.Ed.2d 148, 83 S.Ct. 1068] (1963); Smith v. Digmon, supra at 434 U.S. 333-334; Townsend v. Sain, 372 U.S. 293, 312-314, 316 [9 L.Ed.2d 770, 83 S.Ct. 745] (1963); Young v. Ragen, 337 U.S. 235, 238-239 [93 L.Ed. 1333] (1949); Sixth & Fourteenth Amendments to the United States Constitution.

Therefore, because the state was the beneficiary of Petitioner's federal claims; and because Petitioner has fully and fairly presented those claims to the state's highest court, certiorari should be granted.

2. Respondent now seeks this Court to further deny Petitioner any opportunity to vindicate his federal constitutional claims.

Respondent acknowledges that Petitioner's defense of unconsciousness was an affirmative defense. (Brief of Resp. in Opp., p. 43.).

However, Respondent's only explanation as to why such defense was precluded from the jury's consideration in Petitioner's trial, is that in effect the California Constitution, Article VI, section 10 and the California Penal Code, section 1127, permits a California trial judge to effectively direct a verdict of guilty against a criminal defendant by denying a requested defense instruction.

This contention should in itself, be sufficient grounds for this Court to grant certiorari to determine whether a California trial judge can use the

California constitution and penal code to effectively circumvent the fundamental right to a trial by jury as afforded by the Sixth Amendment to the United States Constitution. Particularly when Respondent now argues that the issue of the denial of a right to trial by jury is not a federal question. (Brief of Resp. in Opp., pp. 42-44). And more particularly where the following authorities show the contrary. Corpus Juris Secundum, Vol. 23A, XV, sections, 1118, 1120, 1128, 1131, 1138, 1139, 1146, 1155, 1158, 1171; Straus v. U.S., 376 F.2d 416, 419 (5th Cir. 1967); U.S. v. Spock, 416 F.2d 165, 180-181 (1st Cir. 1969); Zemina v. Solem, 438 F.Supp. 455, 467-470 (D.C. S.D. 1977), aff'd. 573 F.2d 1027 (8th Cir. 1978); U.S. v. Martin, 704 F.2d 267, 271 (6th Cir. 1983); Rose v. Clark, supra at 478 U.S. 578; United Brotherhood v. U.S., 330 U.S. 395, 408-409 [91

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Therefore, certiorari should be granted in order to make those determinations.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

DATED: July 22, 1989

Respectfully submitted.

/s/
Monte Lee Post, Petitioner
(In pro se)

PROOF OF SERVICE BY MAIL

[Supreme Court Rule 28]

STATE OF CALIFORNIA, COUNTY OF RIVERSIDE:

I am a resident of the aforesaid county; I am over the age of eighteen years and I am not a party to the within entitled action; my business address is:

P.O. Box 2122, Cathedral City, California 92235-2122.

On July 24, 1989, I served the within,

REPLY TO RESPONDENTS BRIEF IN OPPOSITION

on the interested parties or their attorney of record in said action, by placing three true copies thereof enclosed in a sealed envelope with first-class postage thereon fully prepaid, in the United States mail at Palm Springs, California, addressed as shown on the following page:

SEE LIST ON ATTACHED PAGE

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on July 24, 1989, at Cathedral City, Calif.

/s/
Signature, Barbara P. Post

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